2014

Virginia's Gap Between Punishment and Culpability: Re-Examining Self-Defense Law and Battered Woman's Syndrome

Kendall Hamilton

UNIVERSITY OF RICHMOND
LAW REVIEW

VOLUME 49 2014–2015

Editorial Policy

The *University of Richmond Law Review* seeks to preserve the author's writing style when editing articles selected for publication. Each author is given the opportunity to review his or her article prior to its publication.

Furthermore, the *Law Review* strives to promote an open and close working relationship with authors of articles selected for publication. To this end, the *Law Review* will maintain regular correspondence to update authors on the progress of their articles, as well as to resolve any problems that may occur during editing.

Submissions

The *Law Review* welcomes submissions year round on all legal topics. The Lead Articles Editor reviews each submission. The Lead Articles Editor and the Editor-in-Chief make offers of publication, taking into consideration quality and substance, among other factors.

University of Richmond Law Review
University of Richmond, Virginia 23173
Phone: (804) 289-8216
Fax: (804) 287-6438
E-mail: lawreview@richmond.edu
Please visit our website at:
http://lawreview.richmond.edu/

The *University of Richmond Law Review* (ISSN 0566-2389) (USPS 342-410) is published four times a year by students of the University of Richmond Law School. Subscription rate is $35.00 per year; single issues of *The Annual Survey of Virginia Law* are available at $20.00 per copy; other single issues are available at $15.00 per copy. Subscriptions are automatically renewed unless a written request for cancellation is received prior to publication of the first issue of the volume. Periodical postage paid at Richmond, Virginia, and additional mailing offices. POSTMASTER: Send address changes to the *University of Richmond Law Review*, 28 Westhampton Way, University of Richmond, Virginia 23173.

Back issues of Volumes 1 through 48 may be obtained from:
William S. Hein and Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987.

UNIVERSITY OF RICHMOND
LAW REVIEW

VOLUME 49 | ANNUAL SURVEY 2014 | NUMBER 1

CONTENTS

ARTICLES

ESSAYS

COMMENTS

VIRGINIA'S GAP BETWEEN PUNISHMENT AND CULPABILITY: RE-EXAMINING SELF-DEFENSE LAW AND BATTERED WOMAN'S SYNDROME

"Truly humane societies are those . . . that have decided to begin the long march down the road toward the abolition of violence . . . . [and] every once in a while, stop along the way to take stock, and then decide to continue."[1]

INTRODUCTION

Our criminal justice system rests upon the fundamental notion that a defendant's punishment will match her level of culpability.[2] In other words, the defendant should be a "fair candidate for punishment."[3] Accordingly, when punishment outweighs culpability, effectively over-punishing a defendant, the legitimacy of our criminal justice system erodes because the system in which we have bestowed our trust has not produced a fair candidate for punishment. The intersection between Virginia's self-defense laws and the realities surrounding domestic violence demonstrate this over-punishment problem.

In general, Virginia's self-defense laws reflect society's entrenched belief that every person has the right to combat an ag-

1. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 15 (1989) [hereinafter WALKER, TERRIFYING LOVE].

2. *See* Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 445 (2005) ("Notice that we refer to the absence of culpability in cases in which a person is not a fair candidate for punishment . . . . In contrast, in cases in which fault is at issue, we talk not only about the absence of culpability, but also—on the positive side, so to speak—about the varying degrees of culpability.").

3. *Id.*; *see also* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1241 (2005) ("Herbert Wechsler, Paul Tappan, and Louis Schwartz, . . . developed the Model Penal Code . . . [and] understood the Kantian argument that respect for offenders' moral autonomy requires that they be punished in proportion to the seriousness of their crimes."). This comment recognizes that legal scholars disagree as to the exact theory of punishment to be utilized, but despite such disagreement, most are still interested in incorporating a theory of punishment that is fair; namely, a punishment that is "politically legitimate, morally just, or otherwise institutionally necessary." Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 706 (2012).

gressor with proportional force and protect himself or herself accordingly.[4] Thus, under a claim of self-defense, the law recognizes that a defendant, confronted with imminent harm, is not necessarily culpable. Yet, in Virginia, the criminal justice system fails to fully recognize and embrace this connection between culpability and punishment in the context of domestic abuse. In such cases, the abuser is the clear aggressor, but the law may not permit the victim to fight back, thus the law has effectively taken away the victim's right to defend herself.

This comment argues that in order for Virginia's criminal justice system to properly punish women who kill their abusers, effectively restoring their right to self-defend when necessary, Virginia must make two fundamental changes to its self-defense laws. First, Virginia's criminal justice system must advocate for the admission of expert testimony relating to battered woman's syndrome ("BWS").[5] This reform must be uniformly applied throughout our court system. Second, as Virginia's self-defense laws require both a reasonable fear and an overt act, the subjective standard for reasonable fear must also extend to the overt act requirement. This comment explains the significance of these reforms against the current state of Virginia's self-defense laws. In following these reforms, Virginia's courts will begin to appropriately match the punishment for women who kill their abusers to their culpability levels. As a result, a woman acting in self-defense will be able to claim as much under Virginia law when she defends herself against her abuser.

Part I provides a necessary background regarding BWS, namely its classification, symptoms, and relevant history, allowing the reader to better understand the need for legal reform in this area. Part II explains BWS, specifically its conceptual underpinnings and its associated symptoms. It will conclude with a brief examination of Dr. Lenore Walker's—the leading scholar on BWS—critics. Part II explains Virginia's self-defense laws as currently

4. *See* Jeffrey M. Shawver, Note, *Battered by Men, Bruised by Injustice: The Plight of Women Who Fight Back and the Need for a Battered Women Defense in West Virginia*, 110 W. VA. L. REV. 1139, 1143 (2008).

5. Only a handful of circuit courts have permitted experts to testify regarding BWS. *See* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 96–97 (1996). However, this comment advocates for broader reform at the legislative and appellate court levels.

enacted and
tims of dom
given what
must chang
concerning
on the defe
perceives p
reasonable
reforms, Vi
determine
abuser. The
tion that se
balance bet

I. U

Research
woman who
psychologica
thing he wa
psychologica
ment of BW
Lenore Wal
women ever
extreme wa
courts have
theory of se
followed sui

6. *See, e.g.*
WALKER, THE B
battered woman
The term "batte
ship with men.
and against mal

7. *Id.* at xv

8. *See* Par
admissible, at le
the 50 states an
ed expert testim

9. Commo
Marybeth H. L
Virginia Courts

enacted and introduces the reader to the gaps in coverage for victims of domestic abuse suffering from BWS. Part III argues that, given what is known about BWS, Virginia's self-defense laws must change. Part III proposes two reforms: (1) expert testimony concerning BWS should be admissible to show the effects of BWS on the defendant; and (2) because a woman suffering from BWS perceives physical acts differently, the subjective standard for reasonable fear must also apply to overt acts. In applying these reforms, Virginia's courts will be better equipped to appropriately determine culpability in cases where a woman has killed her abuser. These reforms will fully incorporate society's valued notion that self-defense is grounded in necessity and will restore the balance between culpability and punishment.

I. UNDERSTANDING BATTERED WOMAN SYNDROME

Researchers and psychologists define a battered woman as "a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."[6] A psychological consequence of this abuse can include the development of BWS. BWS is a psychological theory first proposed by Dr. Lenore Walker ("Dr. Walker"), which aims to explain why some women eventually kill their abusers rather than respond in less extreme ways, such as leaving the abusive relationship.[7] Many courts have allowed defendants to admit evidence of BWS under a theory of self-defense, through expert testimony.[8] Virginia has not followed suit.[9]

6. *See, e.g.*, LENORE E. WALKER, THE BATTERED WOMAN, at xv (1979) [hereinafter WALKER, THE BATTERED WOMAN]. This comment will employ Dr. Walker's definition of a battered woman and battered woman's syndrome for the purpose of academic consistency. The term "battered women" includes wives and women in any form of intimate relationship with men. However, the author recognizes that violence between same-sex partners and against male partners is equally problematic.

7. *Id.* at xvi–xvii.

8. *See* Parrish, *supra* note 5, at 83 ("Expert testimony on battering and its effects is admissible, at least to some degree, or has been admitted without discussion . . . in each of the 50 states and the District of Columbia. On the other hand, 18 states have also excluded expert testimony in some cases . . . .").

9. Commonwealth v. Hackett, 32 Va. Cir. 338, 338 (1994) (Westmoreland County); Marybeth H. Lenkevich, *Admitting Expert Testimony on Battered Woman Syndrome in Virginia Courts: How* Peeples *Changed Virginia Self-Defense Law*, 6 WM. & MARY J.

Today, many jurisdictions recognize BWS and have adopted BWS as an umbrella term for all domestic-abuse-related disorders.[10] Despite the fact that a minority of psychologists still debate the most appropriate classification of and treatment for domestic abuse victims, the majority of psychologists view BWS as an appropriate categorization and an explanation of the psychological effects of domestic abuse.[11] Importantly, while this comment recognizes that some psychologists are critical of BWS, this comment neither evaluates BWS's legitimacy as a psychological theory nor compares it to other proposed theories. Rather, this comment adheres to a strict legal analysis of BWS and follows the language that many state legislatures have enacted, accepting BWS as a legitimate disorder, and argues that such recognition should extend to Virginia.[12]

As previously mentioned, BWS explains the psychological impact suffered by victims of domestic violence.[13] A concept central to BWS is "learned helplessness."[14] In an abusive relationship, a woman may learn that she cannot control the violent attacks because regardless of her behavior, her partner will continue to abuse her physically and/or verbally.[15] Consequently, believing that she cannot predict the effects of her own behavior, the woman adopts a new behavior seeking to maximize predictability.[16] Importantly, Dr. Walker concludes that learned helplessness

WOMEN & L. 297, 311–12 (1999).

10. *See* Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 174–75 (1995).

11. For example, many state codes reference BWS specifically, despite continual psychological debate over the disorder. *See, e.g.*, OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2010); WYO. STAT. ANN. § 6-1-203 (2013). Such state codes refer to BWS despite an absence of recognition by the Diagnostic and Statistical Manual 5. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 278 (5th ed. 2010) [hereinafter DSM-5] (suggesting that violence can lead to PTSD instead of explicitly recognizing BWS).

12. *See, e.g.*, OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2010); WYO. STAT. ANN. § 6-1-203 (2013).

13. Lenore E.A. Walker, *Battered Woman Syndrome: Empirical Findings*, 1087 ANNALS N.Y. ACAD. SCI. 142, 145, 147 (2006) [hereinafter Walker, *Empirical Findings*].

14. *See* PAULA NICOLSON, DOMESTIC VIOLENCE AND PSYCHOLOGY: A CRITICAL PERSPECTIVE 59 (2010).

15. WALKER, TERRIFYING LOVE, *supra* note 1, at 50.

16. *Id.* at 50–51 ("[T]hey avoid responses—like escape, for instance—that launch them into the unknown.").

arises from
abusive rela

This cycl
acute abuse
stage, the a
The tensio
stage, wher
partner.[20] T
pite stage.[21]
ing behavio
and followi
may begin t
ed symptom

Often, a
learned hel
but the co-
not mean t
portantly, l
sivity. The
havior. Rat
learns she i
trast to pas
gressive. Re
tion of the
order to pr
feelings of

17. *See* Car
Convictions, an
(2007) [hereinaf
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *See* LEN
[hereinafter WA
25. *Id.* at 8
26. *See* NIC
the woman to li
does—then she
duction in anx
WALKER, THE B

arises from the continual cycle of violence that emerges within an abusive relationship.[17]

This cycle of violence occurs in three stages: tension-building, acute abuse, and forgiveness.[18] First, during the tension-building stage, the abuser commits minor abuse acts towards his victim.[19] The tension-building stage is followed by an acute battering stage, whereby the abuser acts with brutal violence against his partner.[20] The acute battering stage is followed by the loving, respite stage.[21] During this stage, the abuser exhibits "calm and loving behavior" coupled with "pleas for forgiveness."[22] Over time, and following the repetition of these three stages, a woman who may begin to develop BWS may also begin to exhibit its associated symptoms, including learned helplessness.[23]

Often, a woman suffering from BWS and exhibiting signs of learned helplessness simultaneously exhibits passive behaviors, but the co-existence of learned helplessness and passivity does not mean that the two symptoms are one and the same.[24] Importantly, learned helplessness is not necessarily limited to passivity. The term "helplessness" mischaracterizes the learned behavior. Rather than learning helpless behaviors, the abuse victim learns she is helpless to control the violence.[25] Accordingly, in contrast to passive behaviors, some women's behaviors may seem aggressive. Researchers have noted that the anxiety felt in anticipation of the next abusive attack causes some women to act out in order to provoke an attack from her abuser thereby ending the feelings of anxiety.[26] For example, a woman may start a verbal

17. *See* Carol Jacobsen, Kammy Mizga & Lynn D'Orio, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 38 (2007) [hereinafter Jacobsen et al.].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See* LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME 69 (3d ed. 2009) [hereinafter WALKER, THE BATTERED WOMAN SYNDROME].

25. *Id.* at 83–84.

26. *See* NICOLSON, *supra* note 14, at 58 ("If the period of tension gets too painful for the woman to live with—and she has learned that she will be abused no matter what she does—then she may allow an acute battering incident to occur in order to experience a reduction in anxiety and the loving contrition that occurs after the incident.") (citing WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 24, at 54–55) (internal quotation

argument with her abuser despite knowing that such an argument will lead to a violent attack. In so doing, a woman can predict the violence through her own provocation. Beyond a woman's efforts to regain predictability, she also learns to act in a manner that will guarantee her survival. In regard to women who kill, Dr. Walker has stated that instead of exhibiting passive behavior, a battered woman may "reach for a gun . . . because [she] cannot be certain that any lesser action will really protect [her] from being killed by the batterer."[27] Thus, both violent and passive behavior can be symptomatic of learned helplessness.[28] In the legal context, this drive for predictability is critical to understanding how a woman suffering from BWS experiences her situation because although a jury may determine that her behavior was irrational or unreasonable, in reality, her violent or passive behavior is indeed rational in a BWS context.[29] She acts to regain predictability and to ensure her survival within the abusive relationship.

In recent years, many psychologists have started to characterize BWS as a subcategory of Post-Traumatic Stress Disorder ("PTSD") and, indeed, the symptoms associated with both PTSD and BWS help contextualize the BWS-supported defense.[30] Although the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") does not expressly recognize BWS, it does suggest that domestic violence can lead to PTSD, stating, "PTSD in females appears to be attributable to a greater likelihood of exposure to traumatic events, such as rape, and other forms of interpersonal violence."[31] Thus, while the DSM-5 does not address and cite BWS by name, it does recognize that a violent relationship has psychological consequences on the victim that include the development

omitted).

27. WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 24, at 14.

28. *See, e.g., id.*

29. *See* Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 143–44 (1995). *See generally* Conley v. Commonwealth, 273 Va. 554, 563, 643 S.E.2d 131, 136 (2007) (permitting a licensed social worker to testify as an expert regarding the victim's PTSD diagnosis).

30. Walker, *Empirical Findings*, *supra* note 13, at 144. Dr. Walker argues that BWS is a sub-category of PTSD, which "incorporates feminist, trauma, and biopsychosocial models" that can explain the effects of domestic violence. *Id.*

31. DSM-5, *supra* note 11, at 278; *see also* Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 327 (1992) (explaining that BWS as a sub-category of PTSD "is a collection of thoughts, feelings, and actions that logically follow a frightening experience that one expects could be repeated").

of PTSD.[32] I
physically a
all psycholo
that this cla
and conside
point out th
because the
from person
gues that ju
plained in t
and BWS c
BWS as a su

For a psy
must show
toms into t
PTSD, name
ness, and hy
symptoms,
ships, difficu
and intimac
with the af
woman may
ing a certain

These syn
ior in the c
arousal, also
alert to sign

32. DSM-5,
33. NICOLSO
34. *Id.* (quot
Complexity and
VIOLENCE 1252,
35. *See* Cher
in Cases Involvi
drome, 88 N.D. L
36. *See* DSM
at 147.
37. Walker,
38. *Id.*
39. *See supra*
40. Kit Kinp
Women's Self-De

of PTSD.[32] In other words, domestic abuse can leave victims both physically and psychologically injured. It should be noted that not all psychologists favor a PTSD classification because they argue that this classification has a very broad and diverse applicability and consider this broad classification as a negative.[33] Some critics point out that a PTSD sub-classification "is not necessarily useful because the 'effects of interpersonal violence vary substantially from person to person.'"[34] Despite these criticisms, Dr. Walker argues that juries are better able to understand BWS when it is explained in terms of PTSD.[35] Additionally, the symptoms of PTSD and BWS overlap, further supporting the sub-classification of BWS as a sub-category of PTSD.[36]

For a psychologist to diagnose a woman with BWS, the woman must show specific symptoms. Psychologists have grouped symptoms into two categories. First a woman must show signs of PTSD, namely re-experiencing the event, numbing of responsiveness, and hyperarousal.[37] A woman must also show BWS-specific symptoms, which include difficulties with interpersonal relationships, difficulties with body image/somatic concerns, and sexual and intimacy problems.[38] Importantly, these symptoms coincide with the aforementioned three-stage cycle of abuse, in that a woman may be more likely to exhibit a particular symptom during a certain period within the cycle.[39]

These symptoms are critical when examining a woman's behavior in the context of a self-defense claim. For example, hyperarousal, also known as hypervigilance, may cause her to be more alert to signals of danger.[40] Therefore, she may perceive a physical

32. DSM-5, *supra* note 11, at 278.

33. NICOLSON, *supra* note 14, at 68.

34. *Id.* (quoting John Briere & Carol E. Jordan, *Violence Against Women: Outcome Complexity and Implications for Assessment and Treatment,* 19 J. INTERPERSONAL VIOLENCE 1252, 1267 (2004)).

35. *See* Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 937–38 (2012) [hereinafter Terrance et al.].

36. *See* DSM-5, *supra* note 11, at 271–76; Walker, *Empirical Findings*, *supra* note 13, at 147.

37. Walker, *Empirical Findings*, *supra* note 13, at 147.

38. *Id.*

39. *See supra* text accompanying notes 18–22.

40. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 175 (2004); *see also* Terrance et

threat in her abuser's neutral conduct, while an outsider may perceive the same conduct as harmless.[41] Courts have recognized the impact such hypervigilance may have on a defendant suffering from BWS. As an Oklahoma court stated, "the battered woman develops a heightened sensitivity to any kinds of cues of distress . . . . [S]he is more acutely aware that a new or escalated violent episode is about to occur."[42] Another example is the existence of flashbacks, which can "magnif[y] the fear" and cause a woman to "perceive [] each successive battering incident as more dangerous."[43] Consequently, if that perception seems unreasonable to a jury, it will undermine a woman's self-defense claim because a jury will be unaware of this magnified fear.[44] As a result the woman's fear may appear unreasonable and unprovoked.[45] In all, these symptoms reflect how a woman's behaviors and perceptions can appear unreasonable to a fact-finder who is uninformed of the psychological symptoms of BWS.

Many state courts acknowledge that most jurors fail to adequately understand the dynamics of an abusive relationship and the impact that BWS has on the victim defendant's behavior within that relationship.[46] Often juries hold misconceptions about battered women, including that women who remain in battering relationships are free to leave their abusers at any time.[47] Therefore, given these misconceptions and the danger that they present

al., *supra* note 35, at 938 ("[T]he consistent heightened arousal, explicate[s] the sense of constant threat and terror experienced even in the absence of direct confrontation with the abuser.").

41. *See* Kinports, *supra* note 40, at 175.

42. Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992). Notably, during this trial, Dr. Walker provided expert testimony regarding BWS and its associated symptoms. *Id.*

43. InSul Kim, Art as a Catalyst for Social Capital: A Community Action Research Study for Survivors of Domestic Violence and Its Implications for Cultural Policy 32 (2011) (unpublished Ph.D. dissertation, Ohio State University).

44. Terrance et al., *supra* note 35, at 930.

45. *See* State v. Haines, 860 N.E.2d 91, 97–98 (Ohio 2006). In reversing the circuit court's denial of expert testimony regarding BWS, the court stated,

> The expert evidence would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.

Id.

46. *See, e.g.*, State v. Kelly, 478 A.2d 364, 370 (N.J. 1984).

47. *Id.*

to a woman claiming self-defense, courts have been willing to admit expert testimony on BWS. In so doing, courts underscore the value that such testimony can have on "dispell[ing] myths" about domestic abuse.[48]

Early on, critics targeted Dr. Walker's research. Specifically, critics have highlighted her "flawed methodology," which relied heavily on one-on-one interviews with battered women.[49] Critics believed that Dr. Walker's use of leading questions "render[ed] the participants' responses suspect."[50] Additionally, some legal scholars have argued that battered women are not in a state of learned helplessness.[51] The critics point to the inconsistencies that arise from the term learned helplessness, arguing that there exists a "tension . . . between [the] image of battered women as passive and the actual action of those relatively few battered women who kill their batterers."[52] These criticisms misunderstand learned helplessness. As aforementioned, the term "helplessness" is a deceptive term because helplessness denotes passive behavior.[53] Dr. Walker, however, has stated that learned helplessness characterizes the learned behavior, which is driven by a need to reclaim predictability; it does not mean learned passivity.[54] In other words, the woman learns that she is helpless to control her situation. Often this learned behavior includes passivity, but passivity is not a symptom of BWS per se.[55] Despite these criticisms, many courts and state legislatures recognize BWS as a legitimate psychological disorder and will admit expert testimony relating to BWS on a case-by-case basis when relevant.[56] Given such widespread acceptance within the legal community, the

48. Stephanie Duiven, *Battered Women and the Full Benefit of Self-Defense Laws*, 12 BERKELEY WOMEN'S L.J. 103, 107 (1997).

49. Terrance et al., *supra* note 35, at 938.

50. *Id.*

51. *See* Kinports, *supra* note 40, at 173. For a more complete summary of the range of criticisms, see *id.* at 168–77.

52. *Id.* (quoting Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 29 (1989)).

53. *See supra* text accompanying notes 19–25.

54. *See supra* text accompanying notes 23–25.

55. *See supra* text accompanying notes 24–25.

56. *See, e.g.*, State v. Haines, 860 N.E.2d 91, 97–98 (Ohio 2006); State v. Kelly, 478 A.2d 364, 371 (N.J. 1984); Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992).

courts have clearly rejected the criticism described herein, in favor of the psychological research presented by Dr. Walker and her colleagues.

In light of what researchers know about and what other state courts have accepted regarding BWS, it becomes critical for Virginia courts to do the same. The following section discusses Virginia's current self-defense laws. Specifically, Part II examines two elements of Virginia's self-defense laws that pose significant challenges to a defendant suffering from BWS who wants to assert a self-defense claim.

II. VIRGINIA'S LIMITED SELF-DEFENSE LAWS

Virginia's self-defense law is grounded in necessity.[57] As the Supreme Court of Virginia has stated, "[i]f it reasonably appears to a defendant that the danger exists, he has the right to defend against it."[58] For the defendant to show that he had the right to defend, Virginia courts require that the defendant show the presence of both his reasonable fear and an overt act by the victim.[59] If the defendant fails to demonstrate both elements in satisfaction of his evidentiary burden, the court will not permit the affirmative defense.[60]

In Virginia, a defendant need not be completely free of fault to make a claim of self-defense, but if he is at fault, that is, if he started the fight, he must have abandoned the fight before resorting to force.[61] Under a theory of excusable homicide, the defendant, while previously at fault in provoking the attack, argues that

57. VA. PRAC. TRIAL HANDBOOK § 4:13 (2013 ed.) ("The law of self-defense is said to be the law of necessity, meaning that a person may use such force as is necessary to defend himself or herself from harm, but only so much as is necessary. The greater the apparent danger is, the greater is the force which may be used in self-defense.").

58. McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).

59. Commonwealth v. Cary, 271 Va. 87, 98–100, 623 S.E.2d 906, 912–13 (2006).

60. *Id.* at 103–04, 623 S.E.2d at 915–16.

61. McCoy v. Commonwealth, 125 Va. 771, 776, 99 S.E. 644, 646 (1919) ("The rule may be briefly stated thus: If the accused is in no fault whatever, but in the discharge of a lawful act, he need not retreat, but may repel force by force, if need be, to the extent of slaying his adversary. This is justifiable homicide in self-defense. But if a sudden fight is brought on, without malice or intention, the accused, if in fault, must retreat as far as he safely can, but, having done so and in good faith abandoned the fight, may kill his adversary, if he cannot in any other way preserve his life or save himself from great bodily harm.").

he had since "abandon[ed] the fight and retreat[ed] before attempting to repel the attack."[62] Comparatively, under a theory of justifiable homicide, a defendant need not retreat, but must demonstrate that he did not provoke the attack.[63] Therefore, even a defendant's verbal provocation will bar a justifiable homicide defense.[64] Regardless of which theory of self-defense applies, the defendant still carries the burden of proof and must demonstrate specific elements to claim self-defense. The following sections briefly discuss the elements relevant to this comment.

The first element of self-defense is a reasonable fear of death or severe bodily injury.[65] Importantly, Virginia law implicitly recognizes a subjective standard when determining the existence of a reasonable fear; a jury must evaluate a defendant's self-defense claim "through the eyes of the person allegedly threatened."[66] The supreme court has previously held, "[a] defendant may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted."[67] Therefore, if the fact-finder must evaluate the defendant's fear through her eyes, the court must permit adequate means to allow for a deliberate determination on this issue. Currently, as this comment argues, the courts do not.

A. *Under Virginia Law BWS Expert Testimony Is Inadmissible to Establish the Defendant's Reasonable Fear*

Although the standard for reasonable fear remains a subjective standard, a defendant cannot admit certain expert testimony about his individual perception. In a 1985 case, *Stamper v. Commonwealth*, the Supreme Court of Virginia held that "evidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of

62. Lenkevich, *supra* note 9, at 302; *see McCoy*, 125 Va. at 776, 99 S.E. at 646.

63. Lynn v. Commonwealth, 27 Va. App. 336, 350, 499 S.E.2d 1, 7–8 (1998), *aff'd* 257 Va. 239, 514 S.E.2d 147 (1999); *see McCoy*, 125 Va. at 776, 99 S.E. at 646.

64. *See generally* Avent v. Commonwealth, 279 Va. 175, 197–99, 688 S.E.2d 244, 257–59 (2010) (stating that the defendant could not claim self-defense because he was not without fault).

65. McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).

66. Craig v. Commonwealth, 14 Va. App. 842, 844, 419 S.E.2d 429, 431 (1992).

67. *McGhee*, 219 Va. at 562, 248 S.E.2d at 810.

guilt."[68] Courts have come to recognize this rule as the "*Stamper* principle." Underlying the court's holding in *Stamper* was its belief that "the state of the art in medicine and psychiatry is not sufficiently stable and established to form the basis for determining criminal responsibility."[69] Additionally, the court reasoned that the nature of many psychological or medical conditions exist in varying gradations that are "too subtle and shifting."[70] As a result, the court refused (and continues to refuse) to admit expert testimony opining on the defendant's mental state.

While the court continues to reaffirm the *Stamper* principle, the Court of Appeals of Virginia, in *Peeples v. Commonwealth*, albeit in dicta, hinted at the possible expansion of expert testimony regarding the defendant's mental state.[71] In *Peeples,* the defendant wanted to offer expert testimony to show that "he was likely to interpret social situations differently than most people, that he had problems with impulse control, and that he was likely to jump to conclusions."[72] Although the court applied the *Stamper* principle and rejected the defendant's request, the court provided significant insight into potential future divergence from this principle.[73] The court stated:

> In this instance, the expert's opinion evidence was not relevant to prove that the defendant acted to defend himself from a threat of imminent bodily harm, or that he was provoked or acted in the heat of passion. Though this is not to say that expert testimony is never admissible in support of the defenses of heat of passion or self-defense.[74]

Given the court's language, there may exist a possibility that expert testimony may one day be considered relevant and therefore admissible.[75] This comment argues that such cases should include

68. 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985).

69. Peeples v. Commonwealth, 30 Va. App. 626, 631, 519 S.E.2d 382, 384 (1999) (rehearing en banc).

70. *Id.* at 631–32, 519 S.E.2d at 384–85.

71. *Id.* at 634, 519 S.E.2d at 385. *See generally* Lenkevich, *supra* note 9, at 318 (analyzing the effect of the *Peeples* decision on expert testimony and self-defense law in Virginia).

72. *Peeples*, 30 Va. App. at 633, 519 S.E.2d at 385.

73. *Id.* at 634, 519 S.E.2d at 385.

74. *Id.*

75. *See generally* Lenkevich, *supra* note 9, at 318 ("Virginia courts may now be open to reevaluating the admissibility of BWS expert testimony when the mental state of the defendant is at issue, even in the absence of an insanity defense.").

instances when a victim of abuse kills her abuser because expert testimony will be relevant to her belief that there existed a threat of imminent bodily harm. Several circuit courts have admitted expert testimony as it relates to BWS, however, uniform application remains absent.[76] Therefore, without more guidance from the appellate courts, this comment advocates for broader legislative reform in order to promote consistent application.

B. *Virginia Self-Defense Laws Require an Overt Act by the Victim to Make a Claim of Self-Defense*

The second element necessary to establish a defense of self-defense requires that the defendant demonstrate an overt act on behalf of the victim.[77] Fear alone is not enough to claim self-defense.[78] A defendant must show that his fear was responsive to an overt act "indicative of imminent danger at the time."[79] The Supreme Court of Virginia required an overt act as early as 1874, stating that "[p]revious threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer, but there must be some words or overt act at the time clearly indicating a present purpose to do the injury."[80] The overt act is important because its existence evidences necessity.[81] Whether the overt act was factually life-threatening is irrelevant.[82] As the court in *Perkins v. Commonwealth* stated, "[i]t is true that the accused may have misunderstood and feared [the victim's] motive and intent, but bare fear of injury at the hands of another, in the absence of some overt act indicative of imminent danger at that time, will not justify the taking of human life."[83] Unlike the reasonable fear standard, the subjective standard does not extend to overt acts.

---

76. Parrish, *supra* note 5, at 93–96.

77. Vlastaris v. Commonwealth, 164 Va. 647, 651, 178 S.E. 775, 776 (1935).

78. *Id.*

79. *Id.* at 652, 178 S.E. at 776.

80. Stoneman v. Commonwealth, 66 Va. 887, 898 (1874). "[I]t is said, although it is lawful for one to deprive of life another meditating his life, yet he must wait till some overt act is done in pursuance of the meditation. In other words, till the danger becomes imminent." *Id.* at 896.

81. *Vlastaris*, 164 Va. at 651, 178 S.E. at 776. ("The plea of self-defense is a plea of necessity and the necessity must be shown to exist or there must be shown such reasonable apprehension of the immediate danger, by some overt act, as to amount to the creation of necessity.").

82. *See* Perkins v. Commonwealth, 186 Va. 867, 873, 44 S.E.2d 426, 428 (1947).

83. *Id.*

Rather, an overt act is a factual inquiry that does not incorporate a defendant's experience or knowledge.[84]

Despite Virginia courts' on-going fidelity to the traditional doctrine of self-defense and its aforementioned elements, this current doctrine falls significantly short when applied to cases of domestic violence. Because a jury can neither hear evidence of how BWS impacts the defendant's reasonable fear, nor can it stray from demanding an overt act, the defendant cannot meet the elements for a self-defense claim. As a result, a jury or judge will be forced to determine guilt without being fully informed. Part III proposes two key reforms that aim to tailor self-defense laws to the particular challenges raised in cases of domestic abuse, thereby correctly restoring the right to self-defend.

III. PROPOSED LEGAL REFORMS TO VIRGINIA'S SELF-DEFENSE LAWS

For Virginia courts to remain faithful to the fundamental notion that a defendant acting in self-defense is not culpable, two reforms must happen. The fact-finder must be allowed to hear evidence of a victim defendant's BWS through expert testimony.[85] Additionally, the court must apply a subjective standard to the overt act requirement. Part III discusses each of these reforms in turn.[86]

A. *Expert Testimony Should Be Admitted to Show That the Victim Defendant Suffers from BWS*

Admitting expert testimony as it relates to BWS will provide the victim defendant with a necessary opportunity to establish the reasonable fear requirement as part of her self-defense claim. Because self-defense requires a reasonable fear of imminent damage and, as already mentioned, the fact finder will consider the reasonable fear under a subjective standard, a victim defend-

84. Commonwealth v. Sands, 262 Va. 724, 730, 553 S.E.2d 733, 737 (2001).

85. As previously mentioned, a handful of circuit courts have admitted expert testimony related to BWS, accordingly, this comment advocates for legislative reform to promote uniform application. *See supra* Part I.

86. This section refers to the battered woman defendant as "victim defendant" and abuser as "deceased."

ant must have an effective and fair method of conveying what her reasonable fear may be, given the existence of an abusive relationship.[87] Expert testimony will be an effective method to prove a reasonable fear because research has shown that the average person does not understand the effects of domestic abuse, and, therefore, cannot competently determine what a reasonable fear may be without further edification.[88] In other words, without expert testimony informing a fact-finder about how domestic abuse can alter a victim's subjective perceptions of danger, a BWS-afflicted defendant cannot adequately demonstrate to the average person that she had a reasonable fear of death. Furthermore, expert testimony is also a fair method of proving that a reasonable fear existed because both parties will be permitted to examine the expert. Regardless, the fact-finder remains the ultimate evaluator of the testimony. Importantly, not only will the individual defendant benefit from this reform, but the legitimacy of the criminal justice system's will be strengthened because judgments will be the product of fully informed deliberations and not simply decisions based on commonly held misconceptions about domestic abuse victims.[89]

The following section outlines the scope of this reform proposal and examines the need for expert testimony given commonly held misconceptions regarding domestic abuse. It concludes by addressing possible criticisms, including the court's reasoning in *Stamper*.

Currently, Virginia law allows defendants to admit relevant evidence of abuse, but the court will not admit evidence of the effects of said abuse upon a victim defendant.[90] Virginia Code sec-

87. WALKER, TERRIFYING LOVE, *supra* note 1, at 53 ("Unless a jury is allowed to understand the bearing that learned behavior patterns have in determining the actions of battered women [. . .], they may find themselves at a loss in attempting to deliver a reasonable and just verdict.").

88. *See* State v. Kelly, 478 A.2d 364, 379 n.15 (N.J. 1984) (acknowledging that BWS is "beyond the understanding of the average person"); *see also* Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981); State v. Anaya, 438 A.2d 892, 894 (Me. 1981); Ibn-Tamas v. United States, 407 A.2d 626, 655 (D.C. 1979); Hawthorne v. State, 408 So.2d 801, 807 (Fla. Dist. Ct. App. 1982).

89. *See Kelly*, 478 A.2d at 379 n.15.

90. *See* Peeples v. Commonwealth, 30 Va. App. 626, 630–31, 519 S.E.2d 382, 384 (1999); Lenkevich, *supra* note 9, at 311 ("The court system in Virginia has refused to allow BWS expert testimony regarding a defendant's mental state to be considered by a jury in either the guilt phase or the sentencing phase of a trial.").

tion 19.2-270.6 states, "[i]n any criminal prosecution alleging personal injury or death, or the attempt to cause personal injury or death, relevant evidence of repeated physical and psychological abuse of the accused by the victim shall be admissible, subject to the general rules of evidence."[91] Relatedly, while expert testimony is permitted, it is limited to the "nature and extent of [the expert's] knowledge."[92] This limitation aims to exclude expert testimony involving the ultimate issue of fact.[93] Here, the ultimate issue of fact is whether the victim defendant held a reasonable fear of death or bodily injury at the time of the offense. This comment's reform proposal does not seek to disturb this limitation.

The scope of this proposed reform is limited. Experts should be allowed to testify as to whether the victim defendant suffered or is suffering from BWS as well as how BWS affects a woman's perception as it relates to her reasonable fear of imminent harm. This comment does not argue that experts should be allowed to testify as to whether the defendant suffered a reasonable belief of imminent harm *at the time of the killing*. This limitation leaves the core of the *Stamper* principle intact, but addresses its harmful rigidity. This reform essentially walks through the door that the *Peeples* court opened.[94] In allowing the victim defendant to admit expert testimony relating to BWS, the jury will be better able to determine the ultimate issue of fact, namely whether the victim defendant had a reasonable fear of death or serious injury at the time of the killing. In the end, the ultimate issue of fact will still go to the jury. The expert's testimony will simply provide the necessary information for the jury to then make its determination.

Admitting evidence of abuse under section 19.2-270.6 would be sufficient for a victim defendant who is not suffering from BWS, however given the specific symptoms and learned behavior associated with BWS, section 19.2-270.6 is wholly insufficient for a woman suffering from BWS claiming self-defense.[95] The Virginia Code's language and application effectively eliminate the subjec-

91. VA. CODE ANN. § 19.2-270.6 (Repl. Vol. 2008 & Cum. Supp. 2014).

92. Landis v. Commonwealth, 218 Va. 797, 799, 241 S.E.2d 749, 750 (1978); *see* Lenkevich, *supra* note 9, at 307.

93. *See* Freeman v. Commonwealth, 223 Va. 301, 315, 288 S.E.2d 461, 468 (1982); Lenkevich, *supra* note 9, at 307.

94. *See supra* text accompanying notes 71–74.

95. *See supra* text accompanying notes 90–91.

tive standard for reasonable fear in cases involving defendants suffering from BWS. Even if the court admits evidence of abuse, the victim defendant must still show that she experienced a reasonable fear. However, as Part I explained, a reasonable fear for a woman suffering from BWS may not be the same fear that a fact-finder not suffering from BWS envisions as reasonable.[96] Accordingly, admitting evidence under section 19.2-270.6, without more information to provide context, may adversely affect the victim defendant's self-defense claim.[97] For example, the victim defendant would likely be "attuned to her abuser's pattern of attacks," therefore, the deceased's subtle gestures or threats may signify an imminent threat to the victim defendant that a "normal" person would not perceive.[98] In admitting evidence of abuse, the victim defendant may unintentionally invite the fact-finder to make conclusions regarding her reasonable fear, which do not include the fear she actually held at the time of the killing. Alternatively stated, the fact-finder may find her fear to be unreasonable and therefore find that she has not established a claim of self-defense.

This outcome frustrates the purpose of the subjective standard because the fact-finder is no longer evaluating the victim defendant's fear through her eyes, but is supplanting the defendant's reasonable fear for the fact-finder's own reasonable fear. The fact-finder's lack of understanding of BWS and misconceptions have the practical effect of voiding the subjective standard for reasonable fear. Without more evidence, the fact-finder, in essence, cannot help but to ignore the law. Clearly, giving juries more relevant evidence will allow them to better apply a subjective standard to reasonable fear.

Fortunately, the legal system has already developed a mechanism, i.e., expert testimony, that can bridge the jury's harmful gap in understanding. The purpose of expert testimony is "to assist triers of fact in those areas where a person of normal intelligence and experience cannot make a competent decision."[99] Addi-

96. *See supra* Part I.

97. *See* VA. CODE ANN. § 19.2-270.6 (Repl. Vol. 2008 & Cum. Supp. 2014).

98. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1582 (1993) [hereinafter *Legal Responses*].

99. Swiney v. Overby, 237 Va. 231, 233, 377 S.E.2d 372, 374 (1989).

tionally, expert testimony relating to BWS has been shown to be extremely effective in instructing the fact-finder.[100]

Recently, researchers conducted a study involving mock jurors and BWS evidence.[101] Researchers gave the jurors actual case summaries and relevant expert testimony.[102] Researchers determined that when juries were provided with expert testimony, they were more likely to view the case as meeting the requirements of self-defense.[103] Furthermore, the mock jurors understood that the victim defendant had "fewer options" available to her and that the killing was justified.[104] Clearly, and as this study shows, women suffering from BWS do in fact have a self-defense claim; however, in Virginia, the criminal justice system prohibits such defendants from raising this claim by barring expert.

Although this study illustrates the necessity of expert testimony, the study also demonstrates the inherent dangers in creating a stereotypical battered woman. A jury may replace previously held misconceptions surrounding domestic violence with equally misconceived expectations that a "real" battered woman must adhere to the specific symptoms of BWS.[105] For example, one of the study's findings was that mock jurors were more sympathetic to the defendant when the evidence portrayed her as a "'typical' battered woman."[106] While this is a legitimate concern, it highlights the need for defense attorneys to familiarize themselves with BWS and to ensure that any testifying expert can effectively educate the jury. Even if the victim defendant's symptoms stray from a perceived "classic" BWS diagnosis, having an expert on the stand will provide attorneys with an adequate opportunity to elicit testimony regarding the nuances of BWS.

100. *See* Terrance et al., *supra* note 35, at 946.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* While this study supports exposing juries to expert testimony, the study concluded that juries were inclined to support the defendant's position only when the evidence demonstrated that the defendant victim was a "passive" victim. *Id.*

105. *Id.* One author has recently purported a solution that called for replacing BWS testimony with social agency ("SA") testimony. *Id.* at 947–52. SA testimony does not "explain the responses of battered women within a syndrome-based discourse," rather SA testimony seeks to offer an explanation couched in the "overall social context." *Id.* at 948.

106. *Id.* at 946.

The need for the admissibility of expert testimony in cases involving BWS is further bolstered by the case law in other states, which recognize that the average person does not understand the effects of domestic abuse.[107] New Jersey was one of the first states to recognize the need for expert testimony in cases alleging BWS.[108] In *State v. Kelly*, Kelly argued that expert testimony was directly relevant to one of the critical elements of self-defense, namely, that Kelly "believed at the time of the stabbing [of her abuser husband] . . . that she was in imminent danger of death."[109] The New Jersey court agreed and stated:

> Some popular misconceptions about battered women include the beliefs that they are masochistic and actually enjoy their beatings, that they purposely provoke their husbands into violent behavior, and, most critically, as we shall soon see, that women who remain in battering relationships are free to leave their abusers at any time.[110]

Following *Kelly*, many state legislatures enacted laws that permitted expert testimony in cases raising BWS.[111]

For example, the Ohio legislature has explicitly acknowledged the existence of BWS, stating that "the syndrome currently is a matter of commonly accepted scientific knowledge."[112] Yet, Ohio law understands that this commonly accepted scientific knowledge does not translate to public understanding. Ohio recognizes that the "general populace" is not sufficiently familiar with BWS.[113] As a result:

---

107. *See, e.g.*, State v. Borrelli, 629 A.2d 1105, 1112 (Conn. 1993) ("[R]esearch data indicates that potential jurors may hold beliefs and attitudes about abused women at variance with the views of experts who have studied or had experience with abused women. In particular, males are likely to be skeptical about the fear the woman feels in an abusive relationship and about her inability to leave a setting in which abuse is threatened.").

108. *See* State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) ("The combination of all these symptoms—resulting from sustained psychological and physical trauma compounded by aggravating social and economic factors—constitutes the battered-woman's syndrome. Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood."); *see also* Lenkevich, *supra* note 9, at 308–09.

109. *Kelly*, 478 A.2d at 375.

110. *Id.* at 370; *see* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 211–12 (1986); *Legal Responses*, *supra* note 98, at 1580.

111. *See* Parrish, *supra* note 5, at 83.

112. OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2006).

113. *Id.*

> If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the "battered woman syndrome" and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question.[114]

Even if we ignore the substance of the studies, cases, and laws described above, their mere existence undermines a core justification for the Supreme Court of Virginia's *Stamper* principle. As stated in *Stamper* and reaffirmed in *Peeples*, the court believes that psychological evidence "is not sufficiently stable and established," to be admissible.[115] But arguably, with the development of BWS research and the recognition by several states that its existence is "commonly accepted scientific knowledge," the argument that the state of psychiatry is insufficient to support the admission of BWS evidence becomes tenuous.[116] To reiterate, this reform does not advocate for experts to testify on the ultimate issue of fact, rather it argues that expert testimony will appropriately educate the jury as to a reasonable fear within the context of the abusive relationship.

Despite many states and courts accepting the legitimacy of BWS, critics still challenge it.[117] But such criticism only supports the need for expert testimony because it highlights the widespread misunderstandings regarding the disorder. In referring to BWS as an "abuse excuse,"[118] many critics argue that even if BWS does exist, it still fails to explain why some abuse victims kill their abusers.[119] Such arguments are often misled by the use of the term "helplessness" in learned helplessness. Furthermore, these arguments fail to adequately examine the role that learned

114. *Id.*

115. Peeples v. Commonwealth, 30 Va. App. 626, 631, 519 S.E.2d 382, 384 (1999); *see supra* text accompanying notes 68–69.

116. *See* OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2006).

117. Parrish, *supra* note 5, at 83.

118. Alan M. Dershowitz, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?*, 3 BUFF. CRIM. L. REV. 775, 775 (2000) (book review); *see also* Lenkevich, *supra* note 9, at 301 (citing ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994) [hereinafter DERSHOWITZ, THE ABUSE EXCUSE]).

119. Dershowitz, *supra* note 118, at 778.

helplessne
sive relat
"[t]he act
drome. In
symptoms
woman su
behavior i
reflects th
learned he
the victim
had a reas
pert testin
jective sta

Of cours
and the d
Virginia a
evaluating
wealth wil
example, i
timony is
BWS and
nent dang
affirmative
jamin v. S
However,
effectively
that the d
BWS is a
BWS.[125] Th
mony in o
fendant, th
is a psycho

120. *Id.*

121. *See su*

122. WYO. S

123. 264 P.

124. *See id.*
tually the aggr

125. *See ge*
that a woman

126. State v

helplessness plays in forming a woman's behavior within an abusive relationship. For example, Alan Dershowitz argues that "[t]he act of killing is not a symptom of the battered woman syndrome. Indeed, it is largely inconsistent with the characteristic symptoms of passivity."[120] As already addressed in Part I, while a woman suffering from BWS may exhibit passive behavior, passive behavior is not a defining characteristic of BWS.[121] This criticism reflects the commonly held misconceptions regarding BWS and learned helplessness. Importantly, BWS is not an excuse, rather the victim defendant still bears the burden of showing that she had a reasonable fear of imminent harm or death. Admitting expert testimony about BWS simply frames the issue under a subjective standard; it does not extinguish her burden of proof.

Of course, expert testimony can work for both the prosecution and the defense; it is not a defendant-only evidentiary tool. If Virginia admits expert testimony in order to assist fact-finders in evaluating the victim defendant's mental state, the Commonwealth will also be allowed to admit evidence to the contrary. For example, in Wyoming, BWS is statutorily defined and expert testimony is admissible to show that the defendant suffers from BWS and "to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force."[122] In *Benjamin v. State*, a defendant argued that she suffered from BWS.[123] However, the prosecution admitted testimony to the contrary and effectively demonstrated, through the use of expert testimony, that the defendant did not suffer from BWS.[124] Moreover, while BWS is a product of abuse, not all abuse victims suffer from BWS.[125] Therefore, a prosecutor may wish to admit expert testimony in order to show that while the deceased abused the defendant, the defendant was not suffering from BWS. Lastly, BWS is a psychological disorder; it is not legal defense in and of itself.[126]

120. *Id.*

121. *See supra* text accompanying notes 24–25.

122. WYO. STAT. ANN. § 6-1-203 (2013).

123. 264 P.3d 1, 7 (Wyo. 2011).

124. *See id.* at 6–7 (". . . State offered testimony indicating that Ms. Benjamin was actually the aggressor in the relationship.").

125. *See generally* WALKER, THE BATTERED WOMAN, *supra* note 6, at xv (explaining that a woman must suffer abuse at least twice to become a battered woman).

126. State v. Peterson, 857 A.2d 1132, 1148–49 (Md. Ct. Spec. App. 2004).

A Maryland court, making this subtle yet significant distinction, clarified that a defendant must show that the "syndrome evidence would . . . explain[] . . . in light of that pattern of abuse, [how] the defendant could honestly, and perhaps reasonably, perceive an imminent threat of immediate danger."[127] Thus, BWS is not a defense; rather it only has a "bearing, in a given case, on the state of mind element of the defenses of perfect and imperfect self-defense."[128] Clearly, expert testimony can both support and counter claims of BWS. The purpose of expert testimony is to educate the jury, hence expert testimony can support both the defendant's and the prosecution's theory of the case.

Lastly, while it is the courts that apply evidentiary rules relating to expert testimony, reform should occur at the legislative level. Several circuit courts have already admitted expert testimony on the issue. Therefore, in order to provide uniform change, reform must happen at the top.

B. *Extend the Subjective Standard of Reasonable Fear to Overt Act*

The previous section discussed reforming the rules regarding expert testimony, thereby giving a victim defendant an adequate opportunity to argue that her fear was reasonable pursuant to Virginia self-defense laws. However, under the current law reasonable fear alone is insufficient to claim self-defense; a victim defendant must also show that her fear was in response to the deceased's overt act.[129] Therefore, in tandem with this reform is the need to reform the objective overt act requirement to permit the fact-finder to consider overt acts through the eyes of the victim defendant. This section examines the need for reforms in light of the symptoms of BWS. The need for this reform is further evinced through a comparison of two Virginia cases that illustrate how a failure to extend a subjective standard to the overt act requirement frustrates the overall purpose of self-defense laws and leads to absurd results.

127. *Id.* at 1150.
128. *Id.* at 1148–49.
129. *See supra* text accompanying notes 65–67, 77–79.

The overt act requires a defendant claiming self-defense to show that the deceased committed an act, which then triggered the defendant's reasonable fear.[130] Specifically, the overt act must be "indicative of imminent danger at the time."[131] Virginia recognizes that an individual has the right to defend herself, even when there is no objectively real danger, so long as she reasonably perceived a danger. Yet, the courts still require some "trigger" responsible for the defendant's fear. It is this trigger or overt act, that has "effectively seal[ed] the fate of battered women claiming self-defense."[132] Unlike the reasonable fear standard, the court will consider the existence of an overt act under an objective standard.[133] The Virginia courts have not altered the objective overt act requirement. Often, a court's determination as to the existence of an overt act will turn on the temporal nexus between the overt act and the killing, whereby if too much time has elapsed between the overt act and the killing, the victim defendant cannot claim self-defense.[134]

Consequently, as the overt act requirement currently stands, it is incompatible with the realities of BWS and the cycle of violence from which BWS emerges. As mentioned in Part I, BWS is associated with a continuous cycle of violence characterized by three stages: tension-building, acute abuse, and forgiveness.[135] Because the cycle of violence, in essence, provides the victim with a forecast of her partner's abusive behavior, she is able to interpret each act, whether neutral or aggressive, as an indicator of future violence. Thus, given the victim defendant's "intimate knowledge of her batterer," she will become acutely aware of when an escalated violent episode will occur.[136] Importantly, not only will the cycle of violence impact a victim defendant's perception, but the

130. *See* Vlastaris v. Commonwealth, 164 Va. 647, 651–52, 178 S.E. 775, 776 (1935).

131. *Id.* at 652, 178 S.E. at 776.

132. Lenkevich, *supra* note 9, at 304.

133. *See* Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001).

134. *See, e.g.*, State v. Stewart, 763 P.2d 572, 577–78 (Kan. 1988). The defendant, Peggy Stewart, shot her husband while he was sleeping. *Id.* at 574. The court reasoned that "[t]he perceived imminent danger had to occur in the present time, specifically during the time in which the defendant and the deceased were engaged in their final conflict." *Id.* at 577. Accordingly, the court held that no overt act existed. *Id.* at 579; *see also* State v. Norman, 366 S.E.2d 586, 590–91 (N.C. Ct. App. 1989) (emphasizing the need for an overt act for a finding of objective reasonableness).

135. Jacobsen et al., *supra* note 17, at 38.

136. *See, e.g.*, Betchel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992).

symptoms of BWS may also affect a victim defendant's perception regarding her abuser's behavior. For example, during the tension-building stage, a victim may show signs of hypervigilance, whereby the victim will "develop[] a heightened sensitivity to any kinds of cues of distress."[137] Accordingly, the cycle of violence paired with specific BWS symptoms can significantly alter the victim defendant's perception. As a result, neutral acts can become signs of aggression to the extent that no single act committed by the abuser is void of meaning. In the eyes of a woman suffering from BWS, all acts relate back to the abuse.[138] In essence, the relationship itself becomes an overt act of violence producing a reasonable fear.[139] The following two cases illustrate how Virginia's current failure to extend the subjective standard produces absurd results.

1. *Commonwealth v. Sands*

In *Commonwealth v. Sands*, Victoria Shelton Sands ("Sands") shot her husband, Thomas Lee Sands ("Thomas"), five times while he lay in bed watching television.[140] The facts of *Sands* are disturbing. Thomas physically and verbally abused Sands for years.[141] On August 23, 1998, the day of the shooting, a neighbor witnessed Thomas throw Sands down concrete steps.[142] While on the ground, Thomas sat on top of Sands and fired a gun shot into the ground next to her head.[143] As the day progressed, Thomas "drank beer [and] used cocaine."[144] He would "intermittently watch television in the bedroom," then "return[] to the assault upon his wife."[145] Thomas threatened Sands that day, stating, "you will die, I promise you, you will die."[146] Sands' sister-in-law, who was at the house before the shooting, testified that "[she]

137. *Id.*
138. *See* Kinports, *supra* note 40, at 174–75.
139. *See id.*; *see also* Terrance et al., *supra* note 35, at 938 ("As the cycle of abuse continues to establish itself within the relationship, the victim learns to predict both the probable period and severity of the ensuing abusive incident.")
140. 262 Va. 724, 728, 553 S.E.2d 733, 734–35 (2001).
141. *Id.* at 726, 553 S.E.2d at 734.
142. *Id.* at 727, 553 S.E.2d at 735.
143. *Id.*
144. *Id.*
145. *Id.*
146. Sands v. Commonwealth, 33 Va. App. 669, 674, 536 S.E.2d 461, 463 (2000).

helped the defendant pull up her shirt. Upon seeing her injuries, the defendant 'started shaking really, really bad, and her eyes got real wild eyed.'"[147] Soon after, Sands retrieved the gun from a cabinet, went to the bathroom, shot Thomas, and then called 911.[148]

On appeal, the Court of Appeals of Virginia held that imminent danger does not mean immediate danger.[149] Furthermore, the court held that "[t]he evidence, viewed in the light most favorable to [Sands], supports a finding that [Sands] both did believe and reasonably could have believed she was in imminent danger of death or serious bodily harm."[150] The court, in reaching its holding, relied on the overall pattern of severe violence committed by Thomas against Sands, and the specific threat issued that day.[151] Accordingly, the court stated, "[Sands] was without fault in beginning the altercation, reasonably apprehended she was in imminent danger of death or serious bodily harm and, thus, was justified in shooting her husband to prevent him from killing her or further inflicting serious bodily harm upon her."[152]

The case went to the Supreme Court of Virginia on the issue of whether Sands could claim self-defense.[153] The court, adhering to a narrow interpretation of "imminent danger," held that Sands failed to establish a claim of self-defense and reversed the court of appeals' decision.[154] The court's analysis turned on the events leading up to the shooting, specifically the time it took for these events to unfold. In response, it held that enough time elapsed between the last assault and the shooting to bar a claim of self-defense.[155] As supporting evidence, the court relied heavily on the fact that, although only an hour had elapsed, it was sufficient time for the sister-in-law to arrive and assist Sands in undressing.[156] The court stated:

147. *Sands*, 262 Va. at 728, 553 S.E.2d at 735.
148. *Id.*, 553 S.E.2d at 735–36.
149. *Sands*, 33 Va. App. at 678–79, 536 S.E.2d at 465.
150. *Id.* at 679–80, 536 S.E.2d at 466.
151. *Id.* at 679, 536 S.E.2d at 465.
152. *Sands*, 262 Va. at 730, 553 S.E.2d at 737.
153. *Id.*
154. *See id.* at 730–31, 553 S.E.2d at 736–37.
155. *Id.* at 730, 553 S.E.2d at 737.
156. Although the court never fully addressed the presence of the sister-in-law, the court determined that because Sands had time to call her and she had time to arrive before the shooting, enough time had elapsed to disqualify the previous assault as an overt

> [w]hile we do not doubt the defendant's genuine fear for her life or minimize the atrocities inflicted upon her, we cannot point to any evidence of an overt act indicating imminent danger, or indeed any act at all by her husband, when she shot him five times while he reclined on the bed.[157]

Accordingly, the court refused to allow for a claim of self-defense because the defendant had not established the requisite overt act by the deceased.

2. *Commonwealth v. Cary*

In comparing the facts and outcome in *Sands* with the court's holding and reasoning in *Commonwealth v. Cary*, the absurdity of an objective overt act standard becomes markedly clear. In *Cary*, the defendant Rebecca Scarlett Cary and the deceased Mark Beekman had been in a "tumultuous" relationship for fifteen years.[158] The Supreme Court of Virginia characterized the relationship as having "a long history of acts of violence committed by the male upon the female that were frequently occasioned by the excessive use by the male of alcohol and illicit drugs."[159] The couple was separated, yet continued to argue over child-support payments.[160] On May 23, 2002, Cary purchased a handgun because, as she testified, she wanted "to protect [herself and her] children and [their] home."[161] Several months later, Cary allegedly told Beekman's sister that she had purchased the handgun to threaten Beekman if he did not pay child support, suggesting that perhaps Cary was not as fearful as she claimed.[162] At trial, Cary denied these statements.[163] On September 6, 2002, Beekman went to Cary's apartment and the two proceeded to argue over child-support payments.[164] Cary reported that Beekman smelled like al-

act. *See id.* at 730–31, 553 S.E.2d at 737.

157. *Id.* at 730, 553 S.E.2d at 737.

158. 271 Va. 87, 90–91, 623 S.E.2d 906, 907 (2006).

159. *Id.* at 100, 623 S.E.2d at 913. The court noted the severity of Beekman's abuse, recognizing that, "[Beekman] had beaten [Cary] with his fists on numerous prior occasions and, on one occasion, broke a glass in her face. [Cary] testified that, prior to the night on which she shot the victim, he had beaten her as recently as the previous weekend." *Id.* at 95, 623 S.E.2d at 910.

160. *Id.* at 91, 623 S.E.2d at 907.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*, 623 S.E.2d at 907–08.

cohol.[165] When Beekman went to the bathroom, Cary retrieved her gun.[166] Then, "Beekman came out of the bathroom . . . . Beekman again refused to leave the home and 'was still verbally assaulting' Cary, threatening that he would 'smack' her, '"F" [her] up', and 'break [her] up.'"[167] At that point Cary pointed the gun and shot Beekman.[168]

A jury convicted Cary; however, the Court of Appeals of Virginia reversed.[169] The court of appeals held that Cary produced sufficient evidence to claim self-defense.[170] Specifically, in reference to the overt act requirement, the court of appeals stated:

> Beekman's actions immediately prior to the shooting . . . established an overt act of sufficient imminence to entitle her to a self-defense instruction because it supported a finding that the victim, although still over ten feet away, was advancing toward her in a threatening fashion to resume the attack he had stopped only moments earlier.[171]

Importantly, the supreme court agreed for the following reasons. First, Cary had told Beekman to leave her house after he emerged from the bathroom; however, he refused.[172] Second, at that time Beekman threatened Cary with an act of violence.[173] Third, at the exact time of the shooting, Beekman was "'walking or running'" towards Cary.[174] For these reasons, the supreme court affirmed the decision.[175]

In both cases, the courts considered the alleged overt acts under an objective standard and the inequity of the results is easily observed. Each woman's perception was irrelevant to the court's

165. *Id.* Beekman's autopsy revealed the presence of both alcohol and cocaine in his system. *Id.*, 623 S.E.2d at 908. The court acknowledged that the deceased had a history of substance abuse. *Id.* at 100, 623 S.E.2d at 913.

166. *Id.* at 91, 623 S.E.2d at 908.

167. *Id.*

168. *Id.* at 91–92, 623 S.E.2d at 908. Cary then instructed her son to call 911 and dragged Beekman out into the apartment hallway. *Id.* at 92, 623 S.E.2d at 908. When asked why she dragged Beekman out, she stated that she thought it would allow emergency services to get to the body sooner. *Id.* When emergency services arrived, Beekman was dead. *Id.*

169. *Id.* at 94–95, 623 S.E.2d at 909–10.

170. *Id.* at 95, 623 S.E.2d at 910.

171. *Id.* (quoting Cary v. Commonwealth, No. 2031-03-1, 2004 Va. App. LEXIS 623, at *14 (Dec. 21, 2004) (unpublished decision)) (internal quotation marks omitted).

172. *Id.* at 101, 623 S.E.2d at 914.

173. *Id.*

174. *Id.*

175. *Id.* at 90, 101, 623 S.E.2d at 907, 914.

analysis. Rather, the judges, in determining whether each defendant had established an overt act sufficient to claim self-defense, viewed the events and actions through their own perspectives, typically a reasonable proxy for a reasonable person's perspective. However, as a result, Sands went to prison, and Cary went home.[176] As already stated, the difference between these results is manifestly unjust because both women were in violent situations that posed a probable threat to their lives. Arguably, the threat of imminent bodily harm or death existed for both women. If, however, the courts had applied a subjective standard to overt acts, the likelihood that each court would have appropriately sentenced each defendant would undoubtedly have been greater.

The courts in *Sands* and *Cary* focused on the timing of the shootings relative to the last assault.[177] Under this proposed reform, this temporal nexus between the deceased's overt act and the killing would remain intact. Accordingly, a subjective standard would not amount to an open invitation for courts to consider any and all acts on behalf of the deceased. Rather, a subjective standard would still limit the court's analysis to conduct that occurred within a reasonable time before the killing. Thus, for example, a victim defendant could not rely on a beating from two days ago as proof of an overt act thereby justifying her use of deadly force without more evidence.

Comparatively, some scholars have advocated for a complete elimination of the requirement for imminent harm.[178] While the element required for a valid self-defense claim is *imminent* harm, and not immediate harm, courts will often conflate the two terms and require temporal proximity as part of the victim defendant's prima facie case for self-defense.[179] However, scholars and reformers have been critical of the imminent requirement for a variety of reasons that go beyond arguing that a temporal nexus requirement is erroneous against an imminent harm requirement. For example, some argue that the imminent requirement reflects

176. *See supra* text accompanying notes 153–57, 169–71.

177. *See Cary*, 271 Va. at 101, 623 S.E.2d at 913; Commonwealth v. Sands, 262 Va. 724, 730, 553 S.E.2d 733, 737 (2001).

178. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 449 (1991).

179. Terrance et al., *supra* note 35, at 927–28.

a "male-centered" self-defense criteria because it assumes a face-to-face confrontation to be necessary for a valid self-defense claim.[180] These reformers argue that this assumption is more characteristic of a man's claim of self-defense.[181] Furthermore, under this criticism, the imminence requirement, meaning a face-to-face confrontation, fails to "account [for] the cumulative effects of repeated violence, or the prediction of violence in the future."[182] Other scholars argue that requiring temporal proximity between the act and the killing forces self-defense law to deviate from its necessity-based origins.[183] These critiques are valid; however, the reform that this comment proposes does not go so far as to eliminate the imminent harm requirement, nor does it seek to reverse precedent that turns on temporal proximity between the overt act and the killing. Rather this reform, by allowing the court to consider the deceased's behavior through the eyes of a woman suffering from BWS, would expand the types of acts that the court could consider and not the timing of an overt act.

The need to consider both aggressive and neutral acts embraces the role that the cycle of violence plays within the abusive relationship and its effect on a woman suffering from BWS. Within this cycle of violence, an overt act is constantly present because a victim learns to link nonviolent behaviors to violent outbursts.[184] Therefore, if the law were to require courts to consider an overt act under a subjective standard, then the court's analysis would appropriately align with the known realities of domestic abuse and the manner in which it can modify a victim's perceptions. A woman trapped in a cycle of abuse may view one beating as part of a single, on-going assault.[185] As the court in *Sands* acknowledged, on the day of the shooting, Thomas would "intermittently watch television in the bedroom for short periods of time, but al-

180. *Id.* at 927.

181. *Id.*

182. *Id.*

183. Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 100–02 (2001) ("Limiting necessity to the temporal element ignores the problem of absent alternatives. If there really is no escape, or if the accused reasonably perceives that there is none, and it is only a matter of time until the abuser will kill, then insisting on a temporal necessity seems rather beside the point of survival.").

184. *See supra* notes 40–42.

185. *See* WALKER, TERRIFYING LOVE, *supra* note 1, at 105–06.

ways returned to the assault upon his wife."[186] Arguably, from Sands' perspective, the assault was not over. The fact that an hour had elapsed since the last assault is irrelevant because she reasonably believed that another assault was imminent.[187] Accordingly, if the *Sands* court evaluated the overt act from this perspective, one shadowed in a cycle of violence, the existence of an overt act could be proven. Interestingly, the court in *Cary*, while refusing to acknowledge the prior assault as an overt act, did state, "Cary cannot rely solely on the initial assault upon her as the 'overt act' that occasioned her resort to self-defense. However, . . . neither may we disregard that evidence entirely."[188] Thus, by refusing to "disregard [it] entirely," the court clearly understood that such evidence of violence is relevant and was willing to evaluate the defendant's self-defense claim given such evidence.[189] Moreover, under a subjective standard, a court would be permitted to consider the deceased's words and actions against the deceased's proven history of violent and aggressive behavior. Consequently, a court could determine that seemingly harmless behavior, such as the deceased's use of drugs and alcohol, equated to an overt act in the mind of the victim defendant.

The *Sands* and *Cary* court ignored one of the most significant facts: the abusive nature of the relationships and how the violence altered the victim defendants' states of mind.[190] Instead, the courts, through a limited analysis, only focused on events arising from an arbitrary time period before the shooting. If the purpose of a self-defense law is to allow an individual to protect himself or herself from imminent harm, the courts cannot be inflexible in their analysis to the extent of producing inconsistent results. Rather self-defense laws must be tailored to address the specific circumstances of domestic abuse and BWS.

Coincidently, Virginia courts recognize that the deceased's behavior is relevant to a claim of self-defense because such evidence is relevant to show how the defendant may or may not have perceived the deceased. Once a claim of self-defense is raised, the defendant can offer evidence of "specific acts . . . to show the charac-

186. Commonwealth v. Sands, 262 Va. 724, 727, 553 S.E.2d 733, 735 (2001).
187. *Id.* at 727–28, 553 S.E.2d at 735.
188. Commonwealth v. Cary, 271 Va. 87, 101, 623 S.E.2d 906, 913 (2006).
189. *Id.*
190. *See* WALKER, TERRIFYING LOVE, *supra* note 1, at 50.

ter of the victim for turbulence and violence."[191] Thus, the court understands that showing how the defendant viewed the deceased is relevant to a claim of self-defense.[192] However, the court still requires an overt act before such evidence can be admitted, and only once the defendant has established a prima facie case for self-defense. Unfortunately, in the case of BWS, a victim defendant does not have the opportunity to admit evidence of an overt act, because her perception of an overt act may not mirror the perception of a "reasonable" person.

CONCLUSION

Virginia's self-defense laws are an acknowledgment that not all acts of violence should be punished. When a person fears for his or her life as a result of another's actions, then he or she, out of necessity, is allowed to use force to survive. Our society, specifically our legal system, believes that an individual should be allowed to protect himself from death or severe bodily harm. Yet, as the law stands today in Virginia, not everyone has this right.

In reality, a woman trapped in a violent relationship may not be able to effectively defend herself, despite fearing for her life. An abusive relationship can change normal human behavior. Moreover, it can lead to contradictions within normal, accepted social interactions. BWS evinces such a contradiction. BWS explains how seemingly abnormal behavior on behalf of the victim is in fact the victim's attempt at survival. She learns to behave in a manner that reduces violence and increases predictability. Importantly, she can perceive aggressive acts in otherwise neutral behaviors. However, BWS does not erase the instinct to self-defend.

Unfortunately, if a woman suffering from BWS does defend herself through force, she may find that the law, albeit apologetic for the abuse she has endured, is unwilling to allow for an effective defense. Accordingly, this comment proposes two reforms that would attempt to restore an abuse victim's right to self-defense. These proposals are not intended to give women an

191. Jordan v. Commonwealth, 219 Va. 852, 855, 252 S.E.2d 323, 325 (1979).

192. *Id.* In *Jordan*, the court held that there was no valid claim of self-defense. *Id.* Therefore, the deceased's previous acts, specifically "confrontations" between the defendant and the deceased, were inadmissible. *Id.*

"abuse excuse," nor are these reforms intended to give an abuse-victim defendant an extra defense beyond what the law already provides.[193] Rather, these reforms would permit defendants to put on evidence to show that self-defense is an appropriate and legally permissible option. The defendant's fate will still reside in the hands of the fact-finder. The law already recognizes a person's right to self-defend; therefore, the law must fully embrace this notion. Incorporating these reforms will do just that.

From the outset, Dr. Walker underscored the need for juries to be fully informed of the psychological effects of domestic abuse. She recognized that,

> [u]nless a jury is allowed to understand the bearing that learned behavior patterns have in determining the actions of battered women . . . they may find themselves at a loss in attempting to deliver a reasonable and just verdict. And the battered woman, victimized by her man, runs the risk of being victimized yet again by an uncomprehending legal system.[194]

While many states have heeded Dr. Walker's urgings, Virginia has not, and unless the aforementioned reforms are adopted, Virginia courts will continue to operate as an "uncomprehending legal system."[195]

The effects of domestic violence permeate our criminal justice system and until we fully acknowledge these effects and appropriately consider such effects at sentencing, the current gap between culpability and punishment will remain.

Just recently, a California court freed Mary Virginia Jones after she served thirty-two years for first-degree murder, kidnapping, and robbery.[196] Her lawyers argued that, "she would not have been convicted if the jury had heard expert testimony about the impact of intimate partner battering."[197] After an independent investigation, the State agreed to accept a plea of no contest for involuntary manslaughter, which carries with it an eleven-year

193. *See generally* DERSHOWITZ, THE ABUSE EXCUSE, *supra* note 118, at 3 (defining "abuse excuse" as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation").

194. WALKER, TERRIFYING LOVE, *supra* note 1, at 53.

195. *Id.*

196. *Mary Virginia Jones Released from Prison after 32 Years*, ABC7 (Mar. 25, 2014, 12:00 AM), http://abc7.com/archive/9478961/.

197. *Id.*

maximum sentence.[198] As Superior Court Judge William Ryan highlighted, Jones effectively served 11,875 days, in excess of her sentence.[199] Her punishment far outweighed her culpability. By adopting the proposed reforms, Virginia can prevent the same from happening in the Commonwealth

Kendall Hamilton *

198. *Id.*

199. *Id.*

* J.D., 2014, University of Richmond School of Law; B.A., 2007, Johns Hopkins University. Thank you to my family for their support before, during, and after law school. Their continued guidance and encouragement is truly invaluable. Special thanks to Professor Tate for helping develop this comment in the early stages, and to Jonathan Tan and Samantha Fant for encouraging me to take the final steps towards its completion. Lastly, thank you to Tara Badawy and the *University of Richmond Law Review*'s editors and staff for their hard work throughout this process.